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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1556

BRENDAN T. BYRNE, *et al.*,

Appellants,

vs.

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Appellants, Brendan T. Byrne, Governor of the State of New Jersey; Sidney Glaser, Director of Taxation of the State of New Jersey; and Fred G. Burke, Commissioner of Education of the State of New Jersey
State House Annex
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and
On the Statement

MARK SCHORR
Deputy Attorney General
On the Statement

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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vs.

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

This is an appeal from an opinion and judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court for the District of New Jersey declaring unconstitutional and enjoining the enforcement of N.J.S.A. 54A:3-1(b)(2).

Opinions Below

The opinion of the Third Circuit Court of Appeals is as yet unreported. It is attached hereto as Appendix A. The decision of the United States District Court for the District of New Jersey, which the Third Circuit affirmed, is reported at 444 F. Supp. 1228 (D.N.J. 1978). It is attached hereto as Appendix C.

Jurisdiction

The judgment and opinion of the Court of Appeals were filed on January 12, 1979. The judgment affirmed a judgment of the District Court which had declared unconstitutional as repugnant to the First Amendment and enjoined the enforcement of a New Jersey statute, N.J.S.A. 54A:3-1(b)(2). The appellate jurisdiction of the Court is therefore invoked under 28 U.S.C. §1254(b).

Statutes Involved

This appeal concerns the constitutionality of a section of the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1, *et seq.* The provision challenged in the instant case, N.J.S.A. 54A:3-1(b)(2), is but a portion of one of the 79 sections of the Act. The sections of the law which are pertinent to this appeal, N.J.S.A. 54A:2-1, 54A:3-1, 54A:3-1.1, 54A:3-2 and 54A:3-3, are set out in Appendix F.

Question Presented

Does a state impermissibly advance religion in violation of the First Amendment to the United States Constitution

by including within a broad based system of exemptions and deductions in a state income tax law an additional $1000 exemption for dependents who attend schools that generally charge tuition?

Statement of the Case

Under the New Jersey Gross Income Tax Act, taxes are calculated as follows: 2 percent of taxable income up to $20,000, $400 plus 2.5 percent of the excess over $20,000. N.J.S.A. 54A:2-1. A taxpayer determines taxable income by substracting from his gross income certain exemptions and deductions. Thus, he may deduct alimony and separate maintenance payments (N.J.S.A. 54A:3-2) and medical expenses of the taxpayer himself, his spouse and his dependents if they exceed two percent of the taxpayer's gross income. N.J.S.A. 54A:3-3. The Act also authorizes a $1,000 personal exemption for the taxpayer himself (N.J.S.A. 54A:3-1(a)), a $1,000 exemption for the taxpayer's spouse who does not file separately (N.J.S.A. 54A:3-1(b)(1)), a $1,000 exemption if the taxpayer has reached the age of 65 by the close of the taxable year (N.J.S.A. 54A:3-1(b)(3)), a $1,000 exemption if a taxpayer's spouse is 65 years of age at the end of the taxable year (N.J.S.A. 54A:3-1(b)(4)), an exemption of $1,000 if the taxpayer is blind or disabled (N.J.S.A. 54A:3-1(b)(5)), and an exemption of $1,000 if the taxpayer's spouse is blind or disabled. N.J.S.A. 54A:3-1(b)(6).

The Act also provides a double exemption for each taxpayer whose dependent attends a nonpublic school or an elementary or secondary school. N.J.S.A. 54A:3-1(b)(2) exempts $1,000 for each dependent and an additional $1,000 if that dependent attends a nonpublic school:

> "(b) Additional exemptions. In addition to the personal exemptions allowed in (a), the following

> additional personal exemptions shall be allowed as a deduction from gross income:
>
> "... 2. For each dependent who qualifies as a dependent of the taxpayer during the taxable year for Federal income tax purposes—$1,000 plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its primary support from public monies—$1,000."

And N.J.S.A. 54A:3-1.1 exempts an additional $1,000 for a dependent attending an institution of higher education:

> "In addition to the exemptions allowed under N.J.S.A. 54A:3-1, each taxpayer shall be allowed an additional exemption which may be taken as a deduction from his New Jersey gross income in amounts of $1,000.00 for each dependent under the age of 22 years who is attending an accredited post-secondary institution of higher education on a full-time basis and for whom the taxpayer paid one-half or more of the costs of tuition and maintenance of the dependent's attendance at such institution."

Under this system of taxation, a taxpayer whose taxable income is $20,000 and has one dependent will have his liability reduced by $20. If that dependent attends either a non-public elementary or secondary school or a post-secondary institution of higher education, the taxpayer will have his liability reduced by an additional $20.

The United States District Court for the District of New Jersey, in an opinion dated February 1, 1978, found N.J.S.A. 54A:3-1(b)(2) unconstitutional as violative of the Establishment Clause and ordered the following language severed from that provision:

> ". . . plus for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its support from public monies—$1,000." (App. D).

The New Jersey Director of Taxation was enjoined from permitting any taxpayer to take the income tax exemption held unconstitutional for tax years ending in 1977 and in successive years (App. C). *Public Funds for Public Schools of New Jersey* v. *Byrne,* 444 F. Supp. 1228, 1232 (D. N.J. 1978).

On appeal, the United States Court of Appeals for the Third Circuit affirmed. It held the provision unconstitutional in violation of the First Amendment on the sole ground that it had the "primary effect of advancing religion." (App. A at 16a). Concurring in the judgment, Judge Weis expressed his opinion that the words and history of the Religion Clauses did not compel the result reached. He joined in the judgment of the court, however, finding it consistent with the applicable Supreme Court precedent (App. A at 21a).

A Notice of Appeal from the Third Circuit's judgment was filed by the State of New Jersey on April 9, 1979 (App. E).

THE QUESTION PRESENTED IS SUBSTANTIAL

The inclusion within a broad based system of exemptions and deductions in a State Income Tax of an exemption for parents whose dependents attend schools that generally charge tuition is compatible with the Religion Clauses of the First Amendment to the United States Constitution.

This appeal presents a substantial question concerning the meaning of the Court's decisions in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) and *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973). Although the Court of Appeals ultimately concluded that the additional $1,000 exemption from gross income allowed to parents with dependent children attending nonpublic schools in calculating the New Jersey income tax was "closer to" the "tax relief invalidated in *Nyquist*" than the "exemption from taxes sustained in *Walz*", it clearly recognized that there are significant differences between this case and *Nyquist.* The majority opinion described this case as presenting "recurring and troublesome questions concerning the relationship between religion and government" (App. A at 4a). Speaking even more fundamentally, Judge Weis observed in his concurring opinion that:

> "These cases require a realistic approach, not an exaggerated response to nonexistent threats. Simple justice would require that the court honor the decision of the New Jersey legislature . . ." (App. A at 21a).

Recent scholarly commentaries also have concluded that *Walz* and *Nyquist* leave unresolved serious questions con-

cerning the restrictions upon tax credits, deductions and exemptions mandated by the Establishment Clause of the First Amendment. See, *e.g.*, Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 Harv. L. Rev. 696 (1979); Young, *Constitutional Validity of Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 Ohio State L. J. 783 (1977); Nowack, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 Nw. L. Rev. 883 (1976). Therefore, this appeal presents a substantial constitutional question which merits plenary review by the Court.

To focus on the substantial Establishment Clause issue presented by this appeal, it is appropriate first to review the Court's decisions in *Walz* and *Nyquist* and then to compare the challenged section of the New Jersey Income Tax Act with the laws involved in those cases. In *Walz*, the Court sustained exemptions from real property taxation on property used exclusively for religious worship. This result was based not only on the exemption's long history of acceptance but also on the breadth of other charitable and educational institutions in addition to churches which were entitled to claim the exemption. This circumstance led the Court to conclude that:

> "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those

> properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U.S. at 672-673.

However, the Court reached a contrary conclusion in *Nyquist* when confronted with a different form of state tax exemption. *Nyquist* involved the constitutionality of a New York law which provided financial assistance, in several ways, to nonpublic elementary and secondary schools in that state. One section authorized direct grants from the state to certain nonpublic schools for each pupil attending. A second authorized a tuition reimbursement from the State to certain parents of children attending nonpublic schools. The third section authorized parents who failed to qualify for tuition reimbursement to take a credit on their state income tax return for part of their tuition payment to a nonpublic school. The Court found all three parts of the aid package for nonpublic elementary and secondary education to be inconsistent with the Establishment Clause. Within the overall structure of New York's statute, the Court found the sections authorizing tuition reimbursements for some parents and tax credit for other parents to be "legally inseparable." 413 U.S. at 791 n.50. Viewed in this context, the Court found that the tax credit provision not only lacked the same "historical acceptance" as the property tax exemption upheld in *Walz* (*Id.* at 792) but also could not ". . . be squared with the principle of neutrality established by the decisions of this Court." *Id.* at 793.

It is clear from the Court's opinion in *Nyquist* that it did not intend to invalidate other forms of tax deductions which might have some incidental impact on sectarian institutions:

> "Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the 'neutrality' test in *Walz*." *Id.* at 790, n.49.

The Court also noted that:

> "The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, non-public schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor." *Id.* at 794.

The Court therefore held that ". . . in light of the practical similarity between New York's tax and tuition reimbursement programs, . . . neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794.

On the other hand, the $1,000 additional tax exemptions which New Jersey allows parents whose children

attend institutions of higher learning and nonpublic secondary and elementary schools are fully compatible with the neutrality principles embodied in the Religion Clauses of the First Amendment. While both the New Jersey tax exemptions and the tax credits invalidated in *Nyquist* relate to state income taxes (whereas *Walz* involved property tax exemptions), that is where the analogy between this case and *Nyquist* ends. The New Jersey tax exemption provisions are not part of a comprehensive aid package for nonpublic elementary and secondary schools. Rather, they are genuine exemption provisions designed to afford a degree of tax relief to a large class of taxpayers whose circumstances make it likely that they will incur added expenses. The exemptions are identical in amount to other exemptions which may be claimed for various other circumstances of individual taxpayers such as dependency, old age, blindness and disability.* Fur-

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* There were 2,351,819 New Jersey individual-resident income tax returns filed in 1976. The table below indicates the exemptions and deductions claimed on those returns and the total amount of each:

Type of Exemption or Deduction	*Number Claiming Deduction or Exemption*	*Exemptions Claimed*	*Value of Exemption or Deduction Claimed*
Regular Exemption	2,351,819	3,668,755	$1,834,377,500
Age Exemption	189,135	248,924	124,462,000
Blind or Disabled	20,279	20,998	10,499,000
Dependent Children	983,666	2,108,039	1,054,019,500
Other Dependent	120,753	165,218	82,609,000
Private Sch. Exempt.	107,266	178,602	89,301,000
College Exemption	123,783	153,319	76,659,500
Medical Deduction	747,920	N/A	422,025,502
Alimony & Maintenance	17,357	N/A	36,795,475
		6,543,855	$3,730,748,477

State of New Jersey, Annual Report of the Division of Taxation in the Department of the Treasury for Fiscal Year 1977, at 189. (The last Column, entitled "Value of Exemption or Deduction Claimed," reflects exemptions of only $500 each since the New Jersey Income Tax was in effect for the second half of 1976 only.)

thermore, even viewing the educational exemptions in isolation, their essentially nonsectarian character is evidenced by the fact that they may be claimed by any taxpayer with dependents who attend not only nonpublic elementary and secondary schools but also post-secondary institutions of higher education, the majority of which are nonsectarian. *Cf. Meek* v. *Pittenger,* 421 U.S. 349 (1975). See also, *Americans For Separation of Church & State* v. *Blanton,* 433 F. Supp. 97, 102-103 (M.D. Tenn.) (three judge court), aff'd mem. 434 U.S. 803 (1977). It is also significant that the challenged exemption is merely one isolated provision of the New Jersey Gross Income Tax Act,* whose overall purpose could not have been further from that of advancing religion. Rather, the reason for its enactment was to provide an equitable means of funding a constitutional system of free public schools. Therefore, the additional exemption for dependents who attend schools which normally charge tuition is a genuine tax deduction.

The broad class of beneficiaries of the exemptions and deductions provided by the New Jersey tax thus dramatically distinguishes the challenged exemption from the credit invalidated in *Nyquist,* which "[. . . flowed] primarily to the parents of children attending sectarian, nonpublic schools" 413 U.S. at 794. Rather, just as the State in *Walz* had ". . . granted exemption to . . . houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . ." (397 U.S. at 672-673), the State has granted an exemption to parents of children who attend religiously affiliated nonpublic schools as part of a broad range of deductions and exemptions permitted

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* Although the Gross Income Tax Act contains some 79 sections, N.J.S.A. 54A:3-1(b)(2) is the only one which even mentions nonpublic schools.

under the New Jersey income tax. Therefore, unlike an outright grant to a sectarian institution, or a grant disguised as a tax relief program, the challenged exemption does not connote sponsorship of religion. It does no more than grant in an evenhanded manner a meager amount of tax relief to parents whose children attend all schools which normally charge tuition, including institutions of higher education. Therefore, the Establishment Clause question posed by this appeal is not easily answered by *Nyquist* and plenary review by the Court is required.

The appropriateness of plenary review of this appeal is underscored by the recent decision of a three judge district court in *Minnesota Civil Liberties Union* v. *Roemer,* 452 F. Supp. 1316 (D. Minn. 1978), which upheld a section of the Minnesota income tax that provided in pertinent part:

> ". . . The following deductions from gross income shall be allowed in computing net income.
>
> . . .
>
> "Subd. 22. Tuition and Transportation Expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks, and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and Chapter 363. . . ." Minn. Stat. §290.09 (22).

The three judge court concluded that the challenged Minnesota statute is in form and in substance a "true tax deduction" and that it does not have the primary effect of advancing religion:

> ". . . [T]he statute is neutral and neither advances nor impedes religious activity, benefits the parents of children attending both public and non-public schools, has received unchallenged historical acceptance, and is analogous to the long recognized practice of tax deductible contributions to religious and charitable causes by federal and state government. Accordingly, the statute does not have the primary effect of advancing religion in violation of the Establishment Clause." 452 F. Supp. at 1322.

It therefore sustained this section of the Minnesota income tax. Since there is a broader class of beneficiaries of the $1,000 additional exemptions from the New Jersey Gross Income Tax Act than of the deduction sustained in *Minnesota Civil Liberties Union* v. *Roemer*, it is evident that the three-judge court which upheld the deduction from the Minnesota income tax also would have upheld the section of the New Jersey income tax declared invalid by the Third Circuit. This conflict in results between *Roemer* and the present case emphasizes that the issue presented by this appeal is substantial.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully submits that the questions presented by this appeal are so substantial as to require plenary consideration and therefore that probable jurisdiction should be noted.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Appellants
State House Annex
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and
On the Statement

MARK SCHORR
Deputy Attorney General
On the Statement

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1218

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, INC., AMERICANS FOR DEMOCRATIC ACTION, NEW JERSEY REGION OF AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, TRENTON AREA CHAPTER OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ETHICAL CULTURE SOCIETY OF BERGEN COUNTY, NATIONAL COUNCIL OF JEWISH WOMEN, NEW JERSEY CONGRESS OF PARENTS AND TEACHERS, NEW JERSEY EDUCATION ASSOCIATION, SOCIETY OF SEPARATIONISTS, NEW JERSEY CHAPTER, TEANECK CITIZENS FOR PUBLIC SCHOOLS, UNION OF AMERICAN HEBREW CONGREGATIONS,

Appendix A

GILBERT S. BARNES, LINDA B. CAPPELSON, FRED E. CLEVER, SUSAN P. COEN, WARREN D. CUMMINGS, RITA D'JOSEPH, JOHN H. FORD, RUTH D. GLICK, DAVID GOLDBERG, LAWRENCE HAAS, JOHN C. HAZEN, ALEXANDER H. HOLMAN, JOHN PINTARD HORCHNER, W. CLIFFORD JONES, MERLE H. KALISHMAN, JUDITH S. KNEE, LIBBY B. KORENSTEIN, WENDY F. KORENSTEIN, JO KOTULA, PHYLLIS A. MINCH, EDNA B. NORRIS, ALLAN S. OLSEN, DONALD C. OSBORNE, ROSE PAULL, PENNY PISTILLI, DOROTHY BELLE POLLACK, RAYMOND J. POINTIER, EVAN C. RICHARDSON, ALEX ROSEN, DONALD R. SIMON, MARCIA SMITH, PETER E. STOKES, NATHAN TAMARIN, HARRY F. UNGAR, MANYA S. UNGAR, ARTHUR W. WELD, ELIZABETH WINTERMUTE, WILLIAM WITHERS, NANCY DUFFY, ARTHUR KNUDSEN, and GEORGE W. SOPER,

v.

BYRNE, BRENDAN T., Governor of the State of New Jersey, SIDNEY GLASER, Director of Taxation of the State of New Jersey, and DR. FRED G. BURKE, Commissioner of Education of the State of New Jersey,

Appellants,

NEWARK ARCHDIOCESAN FEDERATION OF HOME SCHOOL ASSOCIATES, and JAMES P. BEGGANS, JR., New Jersey General Assembly,

Intervening Party Defendants.

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 77-0139

Argued October 5, 1978

(Opinion filed January 12, 1979)

Before ROSENN and WEIS, *Circuit Judges*, and HANNUM, *District Judge**

JOHN J. DEGNAN
Attorney General of New Jersey
STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and on the Brief

MARK SCHORR
Deputy Attorney General
On the Brief
State House Annex
Trenton, New Jersey 08625
Attorneys for Appellants

SAMUEL M. KOENIGSBERG, ESQUIRE
546 Valley Road
Montclair, New Jersey 07043

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* Honorable John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

LEO PFEFFER, ESQUIRE
15 East 84th Street
New York, New York 10028
Attorneys for Appellees

JAMES P. BEGGANS, JR., ESQUIRE
18 Bank Street
Summit, New Jersey 07901
Pro Se

OPINION OF THE COURT

ROSENN, *Circuit Judge*

This case presents recurring and troublesome questions concerning the relationship between religion and government. The occasion for our consideration of these questions is a challenge, under the Establishment Clause of the Federal Constitution, to the State of New Jersey's recent enactment of its first general income tax law which includes tax relief to parents of children attending nonpublic schools.

The commands and guarantees of the first amendment to the Federal Constitution enabling Americans to assemble freely, speak freely, publish freely, and worship freely created the quintessence of a unique and open society which characterized the quality of our Republic. The amendment also "underwrote the admonition of Thomas Jefferson that there should be a wall of separation between church and state."[1] In recent years, the Supreme

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[1] Earl Warren, A Republic If You Can Keep It 117 (1972).

Court succinctly described the attitude of the state to the relationship between man and religion in our society in these words:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual's heart and mind. We have come to realize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality.

Abington School District v. *Schempp,* 374 U.S. 203, 226 (1963).[2]

I.

In 1976 New Jersey instituted a general income tax, which included among its many sections this provision:

> (b) Additional exemptions. In addition to the personal exemptions allowed in (a), the following additional personal exemptions shall be allowed as a deduction from gross income:
>
> * * *
>
> 2. For each dependent who qualifies as a dependent of the taxpayer during the taxable year for federal income tax purposes—$1,000.00 plus, for each de-

[2] As Mr. Justice Brennan wrote in his concurrence in *Schempp,* "[t]he State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion." 374 U.S. at 229.

> pendent child attending, on a full-time basis an elementary or second institution not deriving its primary support from public moneys—$1,000.00.

N.J.S.A. 54A:3-1(b)(2) (West Supp. 1977). This exemption for dependents in nonpublic schools is one of several $1,000 exemptions for which a taxpayer might be eligible. Beside a $1,000 personal exemption, a taxpayer can claim additional $1,000 exemptions if he or she has a spouse, if the taxpayer or spouse is 65 or older, if the taxpayer or spouse is blind or disabled, or if a dependent of the taxpayer attends a college or university and receives from the taxpayer at least half the costs of tuition and maintenance. N.J.S.A. 54A:3-1(b)-(6), 54A:3-1.1 (West Supp. 1977).

Contending that the exemption for dependents in nonpublic elementary or secondary schools violates the Establishment Clause of the first amendment, several organizations interested in the relation of church and state, as well as several individual taxpayers, sued in the United States District Court for the District of New Jersey seeking declaratory and injunctive relief.[3] They named as defendants the Governor of New Jersey, the state's Director of Taxation, and the Commissioner of Education (collectively "the State" or "New Jersey").

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[3] The defendants have not disputed the plaintiffs' standing to bring this action. The individual plaintiffs, as taxpayers, have standing under Flast v. Cohen, 392 U.S. 83 (1968), and the organizations, whose members are taxpayers, have standing under Sierra Club v. Morton, 405 U.S. 727 (1972). *See* Public Funds for Public Schools v. Marburger, 358 F. Supp. 29, 31-32 (D. N.J. 1973), *aff'd mem.* 417 U.S. 961 (1974).

No testimony was presented, and the learned district court characterized its findings of fact as "undisputed." *Public Funds for Public Schools* v. *Byrne*, 444 F. Supp. 1228, 1229 (D. N.J. 1978). The court found that of the 753 nonpublic elementary and secondary schools in New Jersey, 714 (or almost 95 percent) are religiously affiliated. Upon the assumption that most children from New Jersey attending private or parochial schools go to schools within the state, the court concluded that "only a few such children attend a school that is not religiously affiliated." *Id.* at 1129-30. Reasoning that the provision under attack rewards the enrollment of children in religiously affiliated schools, the district court held that "this income tax reduction provision has the direct effect of aiding religion" and that the law, on its face, contravenes the Establishment Clause of the first amendment. *Id.* at 1231. An additional ground for the court's decision was that the provision "would enmesh New Jersey in continuing political strife over aid to religion, thereby engaging the government of New Jersey in excessive entanglement with religion." *Id.* (citation omitted).

The State appealed from the decision of the district court. We affirm.

II.

The first amendment, which the fourteenth amendment makes binding on the states through its Due Process Clause, *Everson* v. *Board of Education*, 330 U.S. 1, 8 (1947), prohibits any law "respecting an establishment of religion."[4] In ruling upon challenges to statutes as viola-

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[4] The late Mr. Justice Black, author of the *Everson* opinion, also perceptively wrote:

(Footnote continued on following page)

tive of the Establishment Clause, the Supreme Court has during this decade carved out three standards. To satisfy the Constitution, a challenged law (1) "must have a secular legislative purpose"; (2) must have, as its "principal or primary effect," neither the advancement nor inhibition of religion; and (3) must avoid excessive governmental entanglement with religion. *See Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971).[5]

In addition to the general guidance of these standards, the Court has delivered two major decisions that deal specifically with tax relief challenged on grounds of the Establishment Clause. In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), the Court upheld a law exempting from taxes real property owned by religious organizations and used for religious worship. The same law also exempted property used for charitable or educational purposes. On the other hand, in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973), the Court struck down a measure for relief of taxpayers who supported dependents in nonpublic elementary or secondary schools. For each such dependent a taxpayer could deduct from his gross income an amount graduated according to his earnings. In

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(Footnote continued from preceding page)

> The First Amendment is truly the heart of the Bill of Rights. The framers balanced its freedom of religion, speech, press, assembly and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security.

The Great Rights 63 (E. Cahn ed. 1963).

[5] The court has cautioned that these standards "are no more than helpful signposts." Hunt v. McNair, 413 U.S. 734, 741 (1973).

New York, which had passed the law, 85 percent of nonpublic schools were religiously affiliated. Because the provision in question thus had the primary effect of advancing religion, the Court declared it to be unconstitutional.

Our task is to apply to New Jersey's provision the three standards that the Court has extracted from the Establishment Clause. Using these standards, we must decide whether the State's $1,000 exemption for those supporting dependents in nonpublic elementary and secondary schools is closer to the exemption from taxes sustained in *Walz* or to the tax relief invalidated in *Nyquist*.

As for the first standard, we conclude that the exemption meets the requirement of secular purpose. In seeking to promote educational pluralism and to relieve some of the burden on public schools in reducing the number of students whom the public schools were required to educate, New Jersey aimed at sufficient secular ends. *See Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773. This was virtually conceded in the district court, but as Judge Meanor observed, the plaintiffs raised the issue in order to preserve it in the event of Supreme Court review.

The exemption, however, encounters an insurmountable obstacle in the second standard—that the "principal or primary effect" of the tax benefits be neither the advancement nor inhibition of religion. In *Nyquist,* a taxpayer supporting a dependent in a nonpublic elementary or secondary school could claim tax relief graduated according to the taxpayer's income; here, such a taxpayer can take a $1,000 deduction, whatever his income may be. Despite this difference in the form of relief, the taxpayer in each instance "is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over

to the State." *Id.* at 791. Because the great majority of eligible taxpayers secure this tax relief by virtue of supporting dependents in religiously affiliated elementary or secondary schools, the "'money involved represents a charge made upon the state for the purpose of religious education.'" *Id., quoting Committee for Public Education* v. *Nyquist,* 350 F. Supp. 655, 675 (S.D. N.Y. 1972) (three-judge district court) (Hays, J., concurring in part in the result, dissenting in part). Under *Nyquist* we are compelled to find unconstitutional this exemption for the taxpayer who supports a dependent in nonpublic elementary or secondary schools.

The Court in *Nyquist* distinguished on three grounds the exemption upheld in *Walz.* On two of these grounds, New Jersey's exemption is clearly closer to the law in *Nyquist* than it is to the law in *Walz.* Like the statute in *Nyquist,* New Jersey's tax benefit cannot claim the long history of acceptance, extending back to colonial times, which characterized the exemption from property taxes upheld in *Walz* for houses of worship. *See* 413 U.S. at 792. Furthermore, the *Nyquist* Court observed that the reason underlying the history of tolerance of tax exemptions for houses of worship was the recognition that taxation could be one form of hostility toward religion and that actual exemption from taxation constituted "a reasonable and balanced attempt to guard against those dangers." *See* 413 U.S. at 793, quoting *Walz,* 397 U.S. at 673. Like the statute in *Nyquist,* New Jersey's exemption does not relieve religious organizations from the threat of "hostile" taxation, as did the complete exemption from property taxes of places of worship in *Walz. See* 413 U.S. at 793.

New Jersey places great reliance on the third ground by which the court distinguished *Nyquist* from *Walz.* In *Nyquist* the Court wrote:

Appendix A

> The exception challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian nonpublic schools.

413 U.S. at 794. The breadth of the class benefited by a law is an important criterion by which to judge constitutionality. Because the first amendment does not proscribe laws having only incidental advantages for religion, *see Walz* v. *Tax Commission,* 397 U.S. at 671-72, breadth in the benefited class helps to guarantee that the advantages to religious institutions will indeed be incidental to secular ends and effects.[6] In this case, the State argues that its tax exemption is part of a comprehensive scheme, under which it has granted tax benefits for those likely to incur "added expenses." Among the beneficiaries of relief are taxpayers with dependents in college, taxpayers who are

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[6] The analysis required in cases concerning the Establishment Clause has been compared to the adjudication of equal protection cases. Walz v. Tax Commission, 397 U.S. at 696-97 (Harlan, J., concurring); Kosydar v. Wolman, 353 F. Supp. 744, 753 (S.D. Ohio 1972) (three-judge court), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973).

The Court has also observed that if the class benefitted by a statute is broad, political division along religious lines becomes less likely. The possibility of such divisions could bear on whether a law threatens to entangle church and state. Committee for Public Education v. Nyquist, 413 U.S. at 794, 796 n.54. Because New Jersey's law fails the test of its "effects," we need not reach the issue of entanglement between church and state.

blind or disabled, married taxpayers, and taxpayers 65 or older.

Nyquist could not be distinguished solely on the ground that there are these other exemptions in the New Jersey income tax law. In *Nyquist* the state of New York also added the challenged tax relief to existing exemptions for a taxpayer's supporting dependents, having a spouse, being blind or having a blind spouse, and being 65 or older or having a spouse 65 or older.[7] The tax benefits for support of dependents in nonpublic schools were nevertheless held to be unconstitutional. That New Jersey adopted all of its exemptions and deductions at once, rather than adding the challenged exemption to an existing tax code, as did New York state, might disprove any sectarian intent; it does not, however, reveal that the effects in this case differ from the effects considered in *Nyquist*.

New Jersey, however, resourcefully offers another suggestion by which the additional exemptions in its income tax law may be sustained. The State insists that the challenged exemption fits into a scheme of congruent $1,000 exemptions, as distinguished from the tax relief in *Nyquist* which was different in form and amount from other exemptions, deductions, and modifications allowed by New York law. This distinction between the tax laws of New York and New Jersey, the State argues, permits its exemption to be considered as part of a broad block of exemptions, benefiting a far larger class than those affected specifically by the particular provision questioned in this

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[7] *See* N.Y. Tax Law § 362 (McKinney 1975). These provisions have remained unchanged since 1959 and were in effect when *Nyquist* was decided.

case. That class, contends the state, consists of taxpayers who are likely to have "added expenses."

A challenge brought under the Establishment Clause demands a close examination of how the legislature has drawn its statutory classification. *Cf. Kosydar* v. *Wolman,* 353 F. Supp. 744, 753-54 (S.D. Ohio 1972) (three-judge court) (classifications that disproportionately benefit religion called "highly suspect"), *aff'd mem. sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1973). The State defends the lines it has drawn by analogizing its relief for taxpayers' "added expenses" to the relief from property taxes considered in *Walz*—an exemption from taxation of property devoted to religious, charitable, and educational purposes. The law in *Walz* encompassed a wide range of "entities . . . that foster [the community's] 'moral or mental improvement,'" and was therefore quite comprehensive. 397 U.S. at 672-73. But New Jersey left significant gaps when it created the specific $1,000 exemptions to relieve taxpayers of the burden of "added expenses." Parents supporting children in public elementary or secondary schools are denied the additional benefit of the challenged exemption. *See Committee for Public Education* v. *Nyquist,* 413 U.S. at 723 n.38.[8] Even if parents of dependents in nonpublic schools do have greater expenses than those supporting dependents in public schools, the State may not "equalize" the burden by granting a benefit only to taxpayers with dependents in

[8] *Cf.* Minn. Civ. Lib. Union v. Roemer, 452 F. Supp. 1316, 1322 (D. Minn. 1973) (deduction available to parents of public school children, as well as to parents of children in private or parochial schools).

private or parochial schools.[9] *Nyquist* explicitly forecloses the argument that the State may deny an exemption to the parents of students in public schools but may grant an exemption to parents of students in nonpublic schools, on the supposition that this differing treatment may tend to equalize the two classes of parents in their educational expenditures. *See id.*[10]

Inasmuch as New Jersey's exemption denies to parents of public school students a benefit granted to parents of students in nonpublic schools, the exemption is not saved because a similar provision applies to parents of college and university students, including those in public institutions. *See* N.J.S.A. 54A:3-1.1 (West Supp. 1977). The State maintains that this similar provision makes the class benefited here broader than the favored class in *Nyquist,*

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[9] On the ground that the tax benefit in *Nyquist* did not extend to parents of all school children, the Court distinguished Everson v. Board of Education, 330 U.S. 1 (1947) (state bears expense of transporting all students to school, whether school public or nonpublic), and Board of Education v. Allen, 392 U.S. 236 (1968) (textbooks lent to all students, whether in public or nonpublic schools). *See* Committee for Public Education v. Nyquist, 413 U.S. at 782 n.38.

[10] Footnote 38 in *Nyquist,* which treats this question, referred to reimbursements for tuition, but the same reasoning applies both to reimbursements and to tax benefits. The Court wrote: "We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an . . . endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. . . . The grants to parents of private school children are given in addition to the right they have to send their children to public schools 'totally at state expense.' " 413 U.S. at 782 n.38. The same rationale governs this case.

but the beneficial provision for collegiate education does not correct the disparate treatment for elementary and secondary levels of education.

We must therefore hold that New Jersey's exemption for taxpayers who support dependents in nonpublic elementary or secondary schools is not a neutral approach to religion; it does not encompass a comprehensive system of educational exemptions. The law in *Walz,* by way of contrast, met the requirements of neutrality as to religion because the exemption for property taxes was part of a comprehensive scheme of charitable and educational exemptions.[11]

Finally, the State has sought to distinguish *Nyquist* by one other argument. In *Nyquist,* New York had not only provided tax relief in support of dependents in nonpublic schools, but in a separate section of the same law the legislature had granted reimbursements to some taxpayers for the tuition paid to private and parochial schools. The tax benefits were "designed to provide a form of relief to those who fail to qualify for tuition reimbursement." 412 U.S. at 765. Observing that the Court in *Nyquist* found the two provisions "legally inseparable," *id.* at 791 n.50, New Jersey now argues that its law, which grants no reimbursements, is not subject to the strictures of *Nyquist.* But in

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[11] The Supreme Court has reserved the question whether "a genuine tax deduction, such as for charitable contributions," would satisfy the neutrality test in *Walz.* Committee for Public Education v. Nyquist, *supra,* 413 U.S. at 790 n.49. As we interpret the phrase "genuine tax deduction," it refers to the comprehensiveness of the tax relief granted by a challenged statute. Because New Jersey's scheme is insufficiently comprehensive, the law questioned in this case does not create a "genuine tax deduction."

describing the tax relief and the reimbursements as "legally inseparable," the Court was not expressing the view that the tax relief was invalid because reimbursements were conferred by the same statute. Instead, the Court found that the provisions for tax relief and for reimbursements each independently violated the Constitution, and that they were unconstitutional for the same reasons: ". . . [U]nder the facts of this case, the two are legally inseparable and . . . if § 2 [concerning reimbursements] does violate the Establishment Clause, *so, too,* do the sections conferring tax benefits." *Id.* (emphasis deleted and supplied).

We hold that the exemption has a primary effect of advancing religion and therefore violates the first amendment. In view of this conclusion, we need not reach the third standard—the test of entanglement—which the Court also has applied to laws challenged under the Establishment Clause.

The judgment of the district court will be affirmed. Costs taxed against the appellants.

WEIS, *Concurring.*

When New Jersey was required to find a new method of financing its educational system, it chose to impose a graduated income tax. In formulating the levy, the legislature recognized that parents who send their sons and daughters to nonpublic schools spare the state and its taxpayers the not inconsiderable expense of educating these children—a cost that would otherwise be incurred in fulfilling the state's obligation to provide a free primary and secondary education. Consequently, those parents were

found to be entitled to special consideration under the new educational tax statute. They were allowed to exclude $1,000 from their gross income for each child in attendance at a nonpublic school. As the majority opinion details, other provisions have not been challenged by the plaintiffs, who have singled out for attack the exemption to parents of children attending nonpublic grade and high school.

It bears repeating that what is involved here is not a grant of money or other form of direct aid to nonpublic schools. It is simply an exclusion of an amount of money from gross income resulting in a lowering of the parents' tax bill. In the case of a parent earning $20,000, the total savings would be $20—certainly a trivial amount compared to what it would cost New Jersey to educate a child in the public school system.

Plaintiffs' objection to this tax measure is that it advances religion because most of the nonpublic schools are sectarian. The argument is that the parent is rewarded for sending his children to nonpublic schools, thus representing a charge made upon the state for the purpose of promoting religious education. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 790-91 (1973). It is easy to fault this reasoning, both in its theoretical premises as well as its unrealistic point of view, but extended discussion would accomplish little at this point. I have great difficulty, however, in understanding why the exclusion here is more of an aid to religion than a direct contribution to a church, synagogue, temple or mosque which is deductible under the Internal Revenue Code. *See* I.R.C. § 170, 26 U.S.C. § 170 (1976). It is all the more puzzling because the benefits the state receives from the continued operation of a congregation are not as directly recognizable nor finan-

cially calculable as the education received by nonpublic school children.

Although New Jersey has no obligation to furnish religious facilities to its citizens, indeed is prohibited from doing so, it has assumed the responsibility of educating its children. Yet the state's financial burden is lessened whenever parents send their child to a nonpublic school. There is therefore more justification for permitting the school tax deduction than the charitable deduction, at least from the standpoint of advancing the governmental interest.

Aside from this inconsistency,[1] doctrinal variances also may be found in recent Establishment Clause pronouncements of the Supreme Court. Certainly, the property tax exemption at issue in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), produced a direct and measureable benefit to religious organizations, but that was not enough to require invalidity. Here, by contrast, the benefit is indirect and uncertain.

An analysis of the cases touching upon state assistance to nonpublic schools could proceed at length, but would merely illustrate the lack of a principled and logical thread. The reality is that the Supreme Court has marked out a series of boundaries and points of departure on an ad hoc basis.[2] Thus, school books may be loaned to pupils, *Board*

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[1] Although the Court has yet to pass on the constitutionality of the charitable deduction, *see* Committee for Public Education v. Nyquist, *supra* at 790 n.49, the practice's long history and widespread social acceptance would seem to point towards its validity, *see* Helvering v. Bliss, 293 U.S. 144, 147 (1934).

[2] *See* Young, Constitutional Validity of State Aid to Pupils in Church Related Schools—Internal Tension between the Establishment and Free Exercise Clauses, 30 Ohio St. L.J. 783 (1977).

of Education v. *Allen,* 392 U.S. 236 (1968), but weather charts may not, *Wolman* v. *Walter,* 433 U.S. 229 (1977). Buses may be provided to allow for transportation of pupils to school, *Everson* v. *Board of Education,* 330 U.S. 1 (1947), but not for field trips to courthouses or museums, *Wolman* v. *Walter, supra.* Financial aid for the construction of buildings may be given to colleges, *Tilton* v. *Richardson,* 403 U.S. 672 (1971), but grants to provide needed maintenance to parochial schools in slum neighborhoods are forbidden, *Committee for Public Education* v. *Nyquist, supra.*

In many of the opinions in this area, I am struck by the frequent use of the metaphor that the first amendment was intended to erect a "wall" between church and state. *E.g., Committee for Public Education* v. *Nyquist, supra* at 761; *Everson* v. *Board of Education, supra* at 16. Insofar as this concept expresses a guiding principle for constitutional adjudication, I find it unfortunate and historically inaccurate.

My first reservation is semantical. So often a wall implies fear and hostility, as the infamous structure separating East and West Berlin so dramatically demonstrates. No such emotions should dominate the relationship between government and religion and the use of a metaphor that encourages such concepts is not desirable.

A more fundamental objection, however, is grounded in the history of the Establishment Clause. Although an accurate description of the Framers' intent is beyond our grasp,[3] it is dubious that the Madisonian-Jeffersonian con-

[3] The debates themselves are inconclusive. *See generally* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1051-52, 1088-90 (1971).

cept of absolute separation was widely accepted by the draftsmen. *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1871-1879 (5th ed. 1891).

Commenting upon the checkered constitutional history of the Establishment Clause, one scholar has noted:

> "[I]t remains at best ironic and at worst perverse to appeal to the history of the establishment clause to strike at practices only remotely resembling establishment in any core sense of the concept." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3 at 819 (1978).

Yet, that is what has been done in using the "wall" concept to justify a policy of judicial hostility towards state aid to nonpublic schools.

Perhaps a more accurate appraisal of the purpose of the first amendment is that the state is to be neutral in its relationship with religion. And so if a particular legislative enactment, particularly in the field of taxation, provides clearly observable secular benefits, then religious institutions should not be barred solely because of their status. *See Walz* v. *Tax Commission, supra;* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 544-54 (1968).

Finally, constitutional adjudication requires that the courts read a particular clause with its historical context in mind, lest the fears and prejudices of an earlier age serve to distort the problems of today. As Justice Powell, who wrote the *Nyquist* opinion, noted some four years later:

Appendix A

> "It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. *See Walz* v. *Tax Comm'n,* 397 U.S. 664, 668 (1970). The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism." *Wolman* v. *Walter, supra* at 263 (Powell, J., concurring in part, dissenting in part).

These cases require a realistic approach, not an exaggerated response to nonexistent threats. Simple justice would require that the court honor the decision of the New Jersey legislature where the *quid pro quo* weighs heavily in favor of the state. But as the majority correctly concludes, the narrow legal issue in this case is whether *Nyquist* or *Walz* governs. Although it seems to me that the dissenters have far the better of it in the *Nyquist* opinions, I cannot in all intellectual honesty say that case differs from the one *sub judice.* I am bound to follow the holding of the majority of the Supreme Court and I therefore concur, albeit reluctantly, in the judgment of the court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1218

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, INC., AMERICANS FOR DEMOCRATIC ACTION, NEW JERSEY REGION OF AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, TRENTON AREA CHAPTER OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ETHICAL CULTURE SOCIETY OF BERGEN COUNTY, NATIONAL COUNCIL OF JEWISH WOMEN, NEW JERSEY CONGRESS OF PARENTS AND TEACHERS, NEW JERSEY EDUCATION ASSOCIATION, SOCIETY OF SEPARATIONISTS, NEW JERSEY CHAPTER, TEANECK CITIZENS FOR PUBLIC SCHOOLS, UNION OF AMERICAN HEBREW CONGREGATIONS, GILBERT S. BARNES, LINDA B. CAPPELSON,

Appendix B

FRED E. CLEVER, SUSAN P. COEN, WARREN D. CUMMINGS, RITA D'JOSEPH, JOHN H. FORD, RUTH D. GLICK, DAVID GOLDBERG, LAWRENCE HAAS, JOHN C. HAZEN, ALEXANDER H. HOLMAN, JOHN PINTARD HORCHNER, W. CLIFFORD JONES, MERLE H. KALISHMAN, JUDITH S. KNEE, LIBBY B. KORENSTEIN, WENDY F. KORENSTEIN, JO KOTULA, PHYLLIS A. MINCH, EDNA B. NORRIS, ALLAN S. OLSEN, DONALD C. OSBORNE, ROSE PAULL, PENNY PISTILLI, DOROTHY BELLE POLLACK, RAYMOND J. POINTIER, EVAN C. RICHARDSON, ALEX ROSEN, DONALD R. SIMON, MARCIA SMITH, PETER E. STOKES, NATHAN TAMARIN, HARRY F. UNGAR, MANYA S. UNGAR, ARTHUR W. WELD, ELIZABETH WINTERMUTE, WILLIAM WITHERS, NANCY DUFFY, ARTHUR KNUDSEN, and GEORGE W. SOPER,

v.

BYRNE, BRENDAN T., Governor of the State of New Jersey, SIDNEY GLASER, Director of Taxation of the State of New Jersey, and DR. FRED G. BURKE, Commissioner of Education of the State of New Jersey,

Appellants,

NEWARK ARCHDIOCESAN FEDERATION OF HOME SCHOOL ASSOCIATES, and JAMES P. BEGGANS, JR., New Jersey General Assembly,

Intervening Party Defendants.

Appendix B

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 77-0139

Present:

ROSENN and WEIS, *Circuit Judges* and
HANNUM, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 5, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed February 16, 1978, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

January 12, 1979

Certified as a true copy and issued in lieu
of a formal mandate on February 5, 1979.

Teste:

THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

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* Honorable John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 77-139

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Plaintiffs,

v.

BRENDAN BYRNE, *et al.*,

Defendants.

Appearances:

Samuel M. Koenigsberg, Esq.
and
Leo Pfeffer, Esq.
(New York Bar)
Attorneys for Plaintiffs.

James P. Beggans, Jr., Esq.
Pro se.
Stockman, Mancino, Marinari, Smithson & O'Donnell, Esqs.
Attorneys for Defendant General Assembly
By: Maris Marinari Sypek, Esq.

Appendix C

William F. Hyland, Esq.
Attorney General of New Jersey
Attorney for Defendants Byrne and
State of New Jersey
By: Mark Schorr, Esq.
Deputy Attorney General

MEANOR, District Judge.

This case presents a slightly different facet of the recurring problem engendered by legislative attempts to provide a tax benefit to the parents of children who attend private rather than public schools at the elementary and secondary level. The issue arises upon plaintiff's challenge[1] to the constitutionality of N.J.S.A. 54A:3-1(b)2 which provides that under New Jersey's income tax law a taxpayer who has a dependent child attending a nonpublic elementary or secondary school on a full time basis may for each such child have a personal deduction of $1,000 against gross income.[2]

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[1] No question of standing has been raised. See *Public Funds For Public Schools of N.J.* v. *Marberger*, 358 F.Supp. 29, 31-32 (D. N.J. 1973), *affirmed sub nom., Marberger* v. *Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974).

[2] N.J.S.A. 54A:3-1 provides in pertinent part as follows:

> Each taxpayer shall be allowed personal exemptions and deductions against his gross income as follows:
>
> • • •
>
> (b) . . . .
>
> . . . .

(Footnote continued on following page)

Appendix C

When this case was called for trial no testimony was presented, all parties agreeing to submit the case on the record as it stood. The facts essential to decision are, therefore, undisputed. Defendants and the intervening defendant[3] admit that there are 753 non-public schools in New Jersey of which 714 are religiously affiliated. Of the latter, 575 or 80% are Catholic.[4] Since it safely may be

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(Footnote continued from preceding page)

2. For each dependent who qualifies as a dependent of the taxpayer during the taxable year for Federal income tax purposes—$1,000.00 *plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its primary support from public moneys—$1,000.00.*

(Emphasis added.) Plaintiffs attack only the italicized portion of the statute.

[3] The intervening defendant, James P. Beggans, Jr., is a member of the New Jersey bar, a taxpayer and the father of three children attending a parochial school.

[4] An exhibit to the brief of defendants Brendan Byrne, Governor of New Jersey, Sidney Glaser, Director of Taxation of New Jersey and Fred G. Burke, Commissioner of Education of New Jersey, states that of the 753 non-public schools in New Jersey their affiliations are as follows:

Catholic	575
Lutheran	8
Jewish	20
Episcopalian	3
Christian	48
Independent	39
Other Denominations	60

assumed that an overwhelming majority of New Jersey children who attend non-public schools attend such schools within New Jersey, it is clear that only a few such children attend a school that is not religiously affiliated.[5]

The parties are in agreement that the Supreme Court has formulated a three-part test to be used in the determination whether a statute violates the establishment clause.[6] In order for a statute to be upheld against an establishment clause attack it must satisfy three conditions: (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive government entanglement with religion.[7] In light of *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973), plaintiffs concede that this court must find that the New Jersey statute in question here has a secular legislative purpose, although they raise the issue in order to preserve it in the event of Supreme Court review.

In their challenge to the statute, plaintiffs rely primarily on *Nyquist, supra,* and argue that that case alone

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[5] The statute in question does not require the payment of tuition or attendance within the state as a pre-condition to the deduction.

[6] The first amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Through the due process clause of the fourteenth amendment the first amendment has been made applicable to the states. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

[7] *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971).

requires the relief they seek. The issues resolved in *Nyquist* that are relevant here dealt with a tuition grant program and a tax benefit program. The New York statute there under review provided a tuition reimbursement for parents of elementary and secondary school children who attended non-public schools. If the parent had an annual taxable income of less than $5,000, the parent could receive a tuition reimbursement of up to $50 for each elementary school child and up to $100 for each secondary school student. The statute also provided for tax relief for those who did not qualify for tuition reimbursement. The law provided that taxpayers who had dependent children attending non-public elementary and secondary schools could subtract from their gross income a defined amount for each such child, but deductions were allowed for no more than three children. It was also provided that as the taxpayer's income increased, the amount permitted to be subtracted decreased. For example, if adjusted gross income was less than $9,000, the amount to be subtracted was $1,000; if income was between $15,000 and $16,999, only $400 could be subtracted, and if income were $25,000 or more, no subtraction could take place.

The Supreme Court invalidated the tuition reimbursement program[8] and then turned its attention to the tax benefit features of the New York statute. The Court began its discussion by noting that the parties had engaged in a dispute "over what label best fits the New York law." 413 U.S. at 789. The appellants maintained that the law provided for tax credit. The State claimed that it was a

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[8] In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), a companion case to *Nyquist*, the Court also invalidated a Pennsylvania tuition reimbursement program.

system of income tax modifications and the Solicitor General, appearing amicus, referred to the statute as providing for income tax deductions.

The Court pointed out that while in effect the scheme was like a tax credit, it was in form a tax deduction. The Court then said, "We see no reason to select one label over another, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it." 413 U.S. at 789.

The Court then went on to say that there was no practical difference between the tuition reimbursement program it had already invalidated and the tax benefit allowances. Under either plan a qualifying parent had the same motivation and reward for sending his child to a non-public school. Only the form in which the financial gain came to the parent was different. Under the tuition reimbursement program, a cash payment was received while under the tax benefit plan the amount of taxable income and, hence, the amount of tax owed, were reduced. The Court ultimately held that ". . . insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." 413 U.S. at 793.

I see no distinction of constitutional moment between the income tax deduction provided in the statute under attack here and the tax benefit program invalidated in *Nyquist*. In both cases the parent taxpayer receives a financial reward from the state for sending his child to a nonpublic school. Since the vast majority of those schools in New Jersey are religiously affiliated it follows that this income tax deduction provision has the direct effect of

aiding religion and is, under *Nyquist*, in violation of the establishment clause.[9]

It is also my opinion that as well as violating the "effect" or second part of the three-part test, the New Jersey statute at issue also violates the "entanglement" or third prong of the test. In *Nyquist*, the Court observed that had the statute remained viable there undoubtedly would have been continuing pressure to enlarge its benefits.[10] One need not be clairvoyant to know that if this New Jersey statute continues there will be increasing pressure to enhance it. This would enmesh New Jersey

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[9] I recognize that defendants claim that the question whether a tax deduction such as New Jersey provides passes constitutional muster was expressly reserved in *Nyquist*. 413 U.S. 791, n. 49. I do not agree. The Court was there reserving the constitutionality of what it called "genuine tax deductions, such as for charitable contributions." New Jersey's deduction is not a true tax deduction. The amount that may be subtracted from gross income need not bear any relation to the tuition paid. Indeed, it is available if no tuition is paid—*e.g.*, the student is on a scholarship. Hence, what is presented is not a true tax deduction but the use of the tax laws to provide a financial incentive for parents to send their children to a non-public school. This falls squarely within the ban of *Nyquist*.

[10] One of the arguments made is that the tax benefits are so small that the financial advantage is of no real significance. The brief of defendants Byrne, Glaser and Burke points out that the tax rate is 2% for taxable income up to $20,000, and for income over $20,000 the tax liability is $400 plus 2.5% of the excess over $20,000. Thus, for example, a taxpayer with a taxable income of $20,000 would have his tax liability reduced by $20 for each dependent child attending a non-public elementary or secondary school. In my judgment, the amount of the benefit is irrelevant. Government may not aid religion—it is not that government may aid religion only a little bit.

in continuing political strife over aid to religion, thereby engaging the goverment of New Jersey in excessive entanglement with religion. *See Nyquist, supra,* 413 U.S. 794-798.[11]

Great emphasis has been placed by defendants upon *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) in which property tax exemptions for religious organizations withstood an establishment clause attack. I need not discuss this argument at length. *Walz* was also relied upon by the appellees in *Nyquist* and was thoroughly distinguished by Mr. Justice Powell's opinion for the majority. Since I have found that *Nyquist* is controlling here, obviously *Walz* can be of no aid to the defendants.

The plaintiffs seek both declaratory and injunctive relief, and have raised a question concerning the scope of that relief. Plaintiffs do not contend that the statute would be unconstitutional if it permitted the deduction only to parents whose children attended a private nonsectarian school. And plaintiffs appear unconcerned whether that section of the statute they attack is stricken entirely or whether the statute is restricted in its effect so as to eliminate any deduction to parents of children

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[11] Since *Nyquist,* the Court by summary affirmance invalidated a California non-public school tuition tax credit plan. *Franchise Tax Board* v. *United Americans for Public Schools,* 419 U.S. 890 (1974) (not reported below), and a similar Ohio program. *Grit* v. *Wolman,* 413 U.S. 901 (1973), *affirming Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1972). Also, the Minnesota Supreme Court held invalid the same type of plan on federal constitutional grounds. *Minnesota Civil Liberties Union* v. *State,* 244 N.W.2d 344 (Minn. Sup. Ct. 1974), *cert. den.,* 421 U.S. 988 (1975).

who attend religiously affiliated private schools.[12] The defendants take the position that the statute cannot be so severed and that if the clause under attack is unconstitutional with regard to attendance of a taxpayer's dependent child in a sectarian school, then the relief must be to deny the deduction altogether and not to preserve it for those parents whose children attend a non-sectarian private school.

Since severability is a question of legislative intent,[13] it seems clear that defendants are correct in their position that the legislature would not wish to retain the deduction with respect to attendance solely at non-sectarian schools. In view of the fact that the overwhelming majority of beneficiaries of the statute as written would be parents of children attending religiously affiliated primary and secondary schools, it is extremely unlikely that the New Jersey legislature would have provided this deduction only for the parents of that comparatively small number of children who attend non-sectarian private schools. *Sloan* v. *Lemon,* 413 U.S. 825, 833-834 (1973).

For the reasons set forth in this opinion, plaintiffs are entitled to a declaratory judgment that that portion of N.J.S.A. 54A:3-1 italicized in footnote 2 of this opinion is unconstitutional in violation of the establishment clause

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[12] The New Jersey Gross Income Tax Act, 54A:1-1 *et seq.* (1976) contains the usual severability clause. N.J.S.A. 54A:9-21.

[13] "Severability is a question of legislative intent. That intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principal object of the statute." *Affiliated Distillers Brands Corp.* v. *Sills,* 60 N.J. 342, 345 (1972).

of the first amendment. Plaintiffs are also entitled to a permanent injunction against defendant Glaser restraining him from permitting any taxpayer to take the income tax deduction held unconstitutional in this opinion for taxable years ending in 1977 and successive years.[14] Injunctive relief is not appropriate as to any other defendant.[15]

Plaintiffs shall present a judgment in conformity with this opinion as soon as possible with consent to the form thereof if attainable. If consent to the form of the pro-

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[14] The New Jersey Gross Income Tax Act became effective with respect to income earned on or after July 1, 1976. N.J.S.A. 54A:9-27. I do not understand that the plaintiffs seek relief affecting deductions for taxable years that ended in 1976. In any event, I believe that such retroactive relief would be a matter within the discretion of the court, and I would exercise my discretion to deny relief for any tax year that ended prior to January 1, 1977. See *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) and *New York* v. *Cathedral Academy*, —— U.S. ——, 54 L.Ed.2d 346 (1977). It is appropriate, however, to grant relief for any tax year that ended during 1977. The New Jersey taxable year must be the same as the taxpayer's taxable year for federal income tax purposes. N.J.S.A. 54A:8-3(a). Since most taxpayers are on a calendar year basis and their New Jersey returns are not due until April 15, there is still time to alert the public and the accounting profession of the unavailability of the deduction hereby invalidated. For the few returns, whether on a fiscal or calendar year basis, that have already been filed for tax years that ended in 1977, I do not believe that it will be unduly burdensome for the Director to assess taxpayers who have taken the deduction with an additional tax.

[15] The Director of the Division of Taxation in the New Jersey Department of the Treasury is charged with administration and enforcement of the New Jersey Gross Income Tax Act. N.J.S.A. 54A:9-17(a) and N.J.S.A. 54A:9-19.

posed judgment cannot be had, plaintiffs may move to settle the form of the order on 24 hours' notice, and such a motion shall be returnable before me any non-holiday morning at 9:30.

DATED: February 1, 1978.

APPENDIX D

Judgment of the United States District Court for the District of New Jersey

(Filed—February 16, 1978)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-0139

Civil Action

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Plaintiffs,

v.

BRENDAN T. BYRNE, *et al.*,

Defendants.

This matter having come to the Court for hearing on January 30, 1978, and the Court having considered the briefs filed on behalf of the parties and the arguments of counsel (Samuel M. Koenigsberg, Esq., and Leo Pfeffer, Esq., Attorneys for Plaintiff; James P. Beggans, Esq., Pro Se; Stockman, Mancino, Marinari, Smithson & O'Donnell, Esqs., Attorneys for Defendant General Assembly of the State of New Jersey, Maria Marinari Sypek, Esq., appearing; John J. Degnan, Esq., Attorney General of New Jersey, Attorney for Defendants Brendan Byrne, Sidney Glaser and Fred G. Burke, Mark Schorr, Deputy Attorney

General, appearing), and a decision of the Court having been duly rendered and good cause appearing for the entry of this Judgment;

It is on this 16 day of February, 1978, hereby ordered and adjudged that judgment be entered, declaring:

1. That the following language of N.J.S.A. 54A:3(b)(2) is unconstitutional in violation of the establishment clause of the first amendment and is severed from the statute:

> ". . . plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its primary support from public moneys—$1,000."

2. That Defendant Glaser is enjoined from permitting taxpayers to take the income tax exemption held unconstitutional in the opinion of the Court dated February 1, 1978 for taxable years ending in 1977 and successive years.

H. Curtis Meanor,
U.S.D.J.

APPENDIX E

Notice of Appeal

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

(Filed—April 9, 1979)

No. 78-1218

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, INC., AMERICANS FOR DEMOCRATIC ACTION, NEW JERSEY REGION OF AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, TRENTON AREA CHAPTER OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ETHICAL CULTURE SOCIETY OF BERGEN COUNTY, NATIONAL COUNCIL OF JEWISH WOMEN, NEW JERSEY CONGRESS OF PARENTS AND TEACHERS, NEW JERSEY EDUCATION ASSOCIATION, SOCIETY OF SEPARATIONISTS, NEW JERSEY CHAPTER, TEANECK CITIZENS FOR PUBLIC SCHOOLS, UNION OF AMERICAN HEBREW CONGREGATIONS, GILBERT S. BARNES, LINDA B. CAPPELSON, FRED E. CLEVER, SUSAN P. COEN, WARREN

Appendix E

D. CUMMINGS, RITA D'JOSEPH, JOHN H. FORD, RUTH D. GLICK, DAVID GOLDBERG, LAWRENCE HAAS, JOHN C. HAZEN, ALEXANDER H. HOLMAN, JOHN PINTARD HORCHNER, W. CLIFFORD JONES, MERLE H. KALISHMAN, JUDITH S. KNEE, LIBBY B. KORENSTEIN, WENDY F. KORENSTEIN, JO KOTULA, PHYLLIS A. MINCH, EDNA B. NORRIS, ALLAN S. OLSEN, DONALD C. OSBORNE, ROSE PAULL, PENNY PISTILLI, DOROTHY BELLE POLLACK, RAYMOND J. POINTIER, EVAN C. RICHARDSON, ALEX ROSEN, DONALD R. SIMON, MARCIA SMITH, PETER E. STOKES, NATHAN TAMARIN, HARRY F. UNGAR, MANYA S. UNGAR, ARTHUR W. WELD, ELIZABETH WINTERMUTE, WILLIAM WITHERS, NANCY DUFFY, ARTHUR KNUDSEN, and GEORGE W. SOPER,

Plaintiffs-Appellees,

v.

BYRNE, BRENDAN T., Governor of the State of New Jersey, SIDNEY GLASER, Director of Taxation of the State of New Jersey, and DR. FRED G. BURKE, Commissioner of Education of the State of New Jersey,

Defendants-Appellants,

and

NEWARK ARCHDIOCESAN FEDERATION OF HOME SCHOOL ASSOCIATES, and JAMES P. BEGGANS, JR., New Jersey General Assembly,

Intervenors-Defendants,

Appendix E

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and

JAMES P. BEGGANS, JR.,

Appellant.

To: CLERK OF THE COURT
LEO PFEFFER, ESQ.
15 East 84th Street
New York, New York 10028

SAMUEL M. KOENIGSBERG, ESQ.
546 Valley Road
Montclair, New Jersey 07043

JAMES P. BEGGANS, JR., ESQ.
18 Bank Street
Summit, New Jersey 07901

SIRS:

Notice is hereby given that Brendan T. Byrne, Governor of the State of New Jersey; Sidney Glaser, Director of Taxation of the State of New Jersey and Dr. Fred G. Burke, Commissioner of Education of the State of New Jersey, Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on January 12, 1979.

Appendix E

This appeal is taken pursuant to 28 U.S.C. §1254(2).

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Appellants, Brendan Byrne, Governor of the State of New Jersey, Sidney Glaser, Director of Taxation of the State of New Jersey, and Dr. Fred G. Burke, Commissioner of Education of the State of New Jersey
By: MARK SCHORR
Deputy Attorney General

Dated: April 6, 1979.

APPENDIX F

Statutes Involved

54A:2-1. Imposition of tax

There is hereby imposed a tax for each taxable year (which shall be the same as the taxable year for Federal income tax purposes) on the New Jersey gross income as herein defined of every individual, estate or trust (other than a charitable trust or a trust forming part of a pension or profit-sharing plan), subject to the deduction, limitations and modifications hereinafter provided, determined in accordance with the following table with respect to the taxpayer's taxable income:

If the taxable income is:	The tax is:
Not over $20,000.00	2% of taxable income
Over $20,000.00	$400.00 plus 2.5% of the excess over $20,000.00

54A:3-1. Personal exemption and deductions

Each taxpayer shall be allowed personal exemptions and deductions against his gross income as follows:

(a) Taxpayer. Each taxpayer shall be allowed a personal exemption of $1,000.00 which may be taken as a deduction from his New Jersey gross income.

(b) Additional exemptions. In addition to the personal exemptions allowed in (a), the following additional personal exemptions shall be allowed as a deduction from gross income:

Appendix F

1. For the taxpayer's spouse who does not file separately $1,000.00.

2. For each dependent who qualifies as a dependent of the taxpayer during the taxable year for Federal income tax purposes—$1,000.00 plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its primary support from public moneys—$1,000.00.

3. Taxpayer 65 years of age or over at the close of the taxable year—$1,000.00.

4. Taxpayer's spouse 65 years of age or over at the close of the taxable year—$1,000.00.

5. Blind or disabled taxpayer—$1,000.00.

6. Blind or disabled spouse—$1,000.00.

(c) Special Rule. The personal exemptions allowed under this section shall be limited to that percentage which the total number of months within a taxpayer's taxable year under this act bears to 12. For this purpose fifteen days or more shall constitute a month.

(d) Nonresidents. A nonresident taxpayer shall be allowed the same deduction for personal exemptions as a resident taxpayer. However, if (1) the nonresident's gross income which is subject to tax under this act is exceeded by (2) his gross income which he would be required to report under this act if he were a resident by more than $100.00, his deduction for personal exemptions shall be limited by the percentage which (1) is to (2).

Appendix F

54A:3-1.1. Dependent under 22 in attendance at accredited post-secondary institution

In addition to the exemptions allowed under N.J.S. 54A: 3-1, each taxpayer shall be allowed an additional exemption which may be taken as a deduction from his New Jersey gross income in amount of $1,000.00 for each dependent under the age of 22 years who is attending an accredited post-secondary institution of higher education on a full time basis and for whom the taxpayer paid one-half or more of the costs of tuition and maintenance of the dependent's attendance at such institution.

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